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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

PIOTR AUGUSTYN,

Plaintiff and Appellant,

v.

SAFEWAY, INC.,

Defendant and Respondent.

A143748

(San Mateo County  
Super. Ct. No. CIV519460)

Plaintiff Piotr Augustyn appeals in propria persona (pro. per.) from a judgment entered in favor of defendant Safeway, Inc. (Safeway) following a court trial. The trial court entered judgment pursuant to Code of Civil Procedure Code section 631.8 after concluding that Augustyn had failed to prove his negligence claim against Safeway. Because Augustyn's failure to provide this court with an adequate record precludes appellate review, we shall dismiss the appeal.

**FACTUAL AND PROCEDURAL BACKGROUND**

The appellate record provided to this court does not include a copy of a complaint or any record of the oral proceedings conducted in the trial court. Based upon what we can discern from the limited record before us, including the trial court's register of actions and the court's statement of decision, Augustyn filed suit against Safeway in January 2013 alleging a single cause of action for negligence.

Augustyn was represented by counsel at the outset of the lawsuit but ultimately represented himself in pro. per. Safeway successfully moved to compel further responses to discovery requests. The court also imposed monetary sanctions of \$726 against

Augustyn to be paid to Safeway. After Augustyn failed to provide further responses required by the court's order and failed to pay the monetary sanctions, the court imposed evidentiary sanctions that precluded Augustyn from introducing evidence at trial pertaining to specified discovery requests. At Safeway's request, the court also granted a motion deeming Augustyn to have admitted matters set forth in a request for admissions served by Safeway. Among other matters conclusively established as a result of the court's order were that Safeway owed no duty of care to Augustyn, that Safeway did not breach any duty of care to Augustyn, and that any injuries Augustyn may have suffered were not caused by Safeway's actions or omissions. In addition, the court ordered Augustyn to pay monetary sanctions of \$300 to Safeway.

The matter proceeded to trial before the court after it was determined that jury fees had not been timely posted. Augustyn was sworn and testified to the facts supporting his negligence claim. As set forth in the court's statement of decision, Augustyn testified that he entered a Safeway store in South San Francisco and asked to use a restroom. Because there were no public restrooms in the store, he was directed to go into a non-public area at the back of the store to use the restroom. The sole restroom was occupied, so he waited in the non-public area behind a set of swinging doors, with his back to the doors. An employee who had finished stocking the bread aisle returned to the back of the store and pushed a multiple-level bread cart through the swinging doors. Augustyn claimed that he was knocked to the ground after the bread cart hit his knee. Augustyn did not see what happened and was not paying attention to the swinging doors or the employee. There was no evidence presented that the cart was defective or that the store employee was inattentive or had pushed the cart unreasonably fast.

Safeway moved for judgment pursuant to Code of Civil Procedure section 631.8 after Augustyn concluded presenting his plaintiff's case. The court orally granted the motion. In a written judgment and statement of decision filed on October 31, 2014, the court ruled that Augustyn failed to prove his claim for negligence against Safeway by a preponderance of the evidence. According to the court, regardless of whether Augustyn sustained personal injury or economic harm, he had failed to prove that Safeway acted

negligently, breached a duty of care, or acted unreasonably under the circumstances. The court concluded that Augustyn presented no evidence of unreasonable or negligent conduct by Safeway employees. The court noted that, in addition to the evidence presented at trial, Augustyn was the subject of evidentiary sanctions as a result of his failure to provide pretrial discovery. The judgment recites that Augustyn failed to present any medical expert testimony at trial.

Augustyn timely appealed the judgment. In his notice designating the record on appeal, Augustyn sought to proceed with a reporter's transcript as the record of the oral proceedings in the trial court. After the trial court clerk notified Augustyn that he was in default for failing to deposit fees for the preparation of the reporter's transcript, he notified the trial court that he wished to proceed without a reporter's transcript. Augustyn did not seek to prepare a settled or agreed statement as a substitute for the reporter's transcript. (See Cal. Rules of Court, rules 8.120(b), 8.134, 8.137.) Consequently, there is no record of the oral proceedings conducted in the trial court.

### **DISCUSSION**

As best as we can tell, Augustyn raises three distinct arguments on appeal. First, he challenges the sufficiency of the evidence supporting the trial court's judgment in favor of Safeway. Second, he contends it was error to assess monetary sanctions. Third, he argues that the court erred by refusing to grant him a continuance to allow his medical expert to testify.

An order granting judgment under section 631.8 of the Code of Civil Procedure is reviewed under the substantial evidence standard. (*Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 608.) An order awarding discovery sanctions, including an award of monetary sanctions, is reviewed for abuse of discretion. (*Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1560.) Likewise, the abuse of discretion standard applies to our consideration of a decision to deny a continuance. (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.)

Safeway argues that the appeal fails for a lack of an adequate record. We agree and conclude that the record deficiencies justify dismissal.

On appeal, we presume the judgment to be correct and indulge all intendments and presumptions to support it regarding matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1415.) An appellant bears the burden of overcoming the presumption of correctness by providing an adequate record that affirmatively demonstrates error. (See *Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859–860.)

The failure to provide this court with an adequate record not only fails to satisfy an appellant’s burden to demonstrate error, it also precludes review of any asserted error. (See *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [appellant who supplies no reporter’s transcript is precluded from challenging sufficiency of the evidence]; *In re Angel L.* (2008) 159 Cal.App.4th 1127, 1136–1137 [court presumes evidence supports judgment when record of pertinent oral proceedings is not provided].) Inadequacy of the record may warrant dismissal of an appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 463 [“Where the appellant fails to provide the reviewing court with a record enabling it to review and correct alleged errors the appeal will be dismissed.”].)

Here, the record is patently inadequate. It does not even contain a complaint, which is the document that frames the dispute before the court. In the absence of a reporter’s transcript or other record of the oral proceedings in the trial court, the appeal is treated as an appeal on the judgment roll. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082–1083.) On such an appeal, the evidence is conclusively presumed to support the trial court’s findings. (*Nielson v. Gibson* (2009) 178 Cal.App.4th 318, 324.) This court’s review is necessarily “limited to determining whether any error ‘appears on the face of the record.’ ” (*Id.* at pp. 324–325.)

Augustyn’s opening brief fails to identify any errors on the face of the limited appellate record that would justify reversing the court’s judgment. The clerk’s transcript alone is insufficient to challenge the trial court’s factual findings with respect to the negligence claim. We also lack an adequate record to assess whether the court abused its

discretion in denying a continuance to allow Augustyn to present medical expert testimony. In the absence of a record of the oral proceedings where the court heard and considered Augustyn's oral motion to continue, we are in no position to assess whether the court erred. In any event, Augustyn could not have been prejudiced by any alleged error. Even if medical expert testimony had been presented, the court still would have concluded that Augustyn failed to prove that Safeway was negligent.

As for Augustyn's contention that the court abused its discretion in awarding monetary sanctions to Safeway, we likewise lack an adequate record to assess his claim. There is no record of the oral proceedings at which the court heard argument on Safeway's requests for monetary sanctions. We cannot pass judgment on the trial court's exercise of discretion without a record of what the court heard or considered at the time it rendered its decision. Further, Augustyn's attempts to cite to the limited record on appeal to support his claim are unavailing. The record indicates that Augustyn sought additional time to pay the sanctions. It also appears that he sought to have the court reconsider the initial set of monetary sanctions by providing further discovery responses. The citations he has provided to the court do not support a claim that he provided responses, much less timely ones, to the discovery requests at issue.<sup>1</sup>

Aside from the lack of record support for Augustyn's challenge to the orders awarding monetary sanctions, his argument fails because he merely complains in a single sentence about the court's order without providing any pertinent legal argument or citation to authority. We would be justified in treating the issue as abandoned. (See *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1120 [appellant's failure to present pertinent legal argument supported by authority justifies dismissal].)

Under these circumstances, dismissal is warranted for lack of an adequate record to permit appellate review. No purpose would be served by attempting to address Augustyn's legal contentions in the absence of a sufficient factual record. We are aware that he brings this appeal without the benefit of legal representation, but his status as a

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<sup>1</sup>The record on appeal appears to contain some limited discovery responses relating to medical issues.

pro. per. litigant does not exempt him from the rules of appellate procedure or relieve his burden on appeal. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.) We treat pro. per. litigants like any other party, affording them “ ‘the same, but no greater consideration than other litigants and attorneys.’ ” (*Id.* at p. 1247)

As a final matter, we note that the parties requested oral argument in response to a notice sent by the court’s clerk, as a matter of course, when the appeal was fully briefed. A party’s right to oral argument exists in any appeal considered *on the merits* and decided by written opinion. (See *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871; accord, *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1254.) Because we dismiss the appeal without reaching the merits, the parties do not have a right to oral argument, which we deem unnecessary to our procedural dismissal of the appeal.

#### **DISPOSITION**

The appeal is dismissed. Safeway shall be entitled to recover its costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.